

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
February 20, 2008 Session

STATE OF TENNESSEE v. JOSEPH S. LUCAS, JR.

Direct Appeal from the Circuit Court for Williamson County
No. II-CR121536 Timothy L. Easter, Judge

No. M2007-01411-CCA-R3-CD - Filed September 26, 2008

The defendant, Joseph S. Lucas, Jr., appeals the sentencing decision of the Williamson County Circuit Court. The defendant was indicted, in an open-dated indictment, for the offense of rape of a child, a Class A felony, which was alleged to have been committed between May 2005 and September 2005. He subsequently pled guilty to the offense and was sentenced to twenty-five years, to be served at 100%, in the Department of Correction. The trial court, in imposing the sentence, applied the 2005 amendments to our criminal code, which became effective June 7, 2005, based upon the trial court's finding that the offense occurred after June 7, 2005. On appeal, the defendant asserts that the trial court erred by: (1) sentencing pursuant to the 2005 sentencing amendments when the proof failed to establish that the offense was committed after the effective date of the amendments; (2) applying two enhancement factors absent a jury determination of those facts; and (3) failing to apply the catchall mitigating factor. Following review of the record, we find no error and affirm the sentencing decision of the Williamson County Circuit Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which NORMA MCGEE OGLE, J., and DAVID G. HAYES, SR. J., joined.

Dana C. McLendon, III, Franklin, Tennessee (on appeal), and Sharon E. Guffee, Franklin, Tennessee (at trial), for the appellant, Joseph S. Lucas, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Ronald L. Davis, District Attorney General; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A Williamson County grand jury returned a three-count indictment charging the defendant with two counts of rape of a child and one count of aggravated sexual battery. The indictment alleged that each of the offenses had occurred between May 2005 and September 2005 against the defendant's granddaughter ("the victim"), a child less than thirteen years of age. The State later filed a Bill of Particulars, which stated that the offenses had occurred during "the summer of 2005."

Following his indictment and arrest, the defendant made a detailed statement to police detectives. The defendant admitted that, while he and the victim were "playing doctor," he had touched the victim's vaginal area, that he had forced her to perform fellatio on him, and that he had ejaculated in his hand. When asked when the incident had occurred, the defendant replied "[t]he last part of the summer" of 2005. During the same interview, the defendant also admitted sexually molesting another minor granddaughter, as well as his three daughters.

The defendant subsequently entered an open guilty plea to one count of rape of a child, with the remaining two counts of the indictment being nolle as part of the agreement. At the sentencing hearing, multiple exhibits were admitted, including the presentence report, the psychosexual evaluation report, and a transcript of the defendant's interview with police. The presentence report indicated that the seventy-year-old defendant had no prior criminal history, had been honorably discharged from service in the United States Army, and had retired from BellSouth after forty years of service. The defendant also introduced evidence of his extensive volunteer work at a local senior citizen center.

Based upon the evidence presented, the trial court found two enhancing factors were applicable: (1) a previous history of criminal convictions or conduct, based upon the defendant's admissions of molesting another of his granddaughters and his three daughters; and (2) the defendant had abused a position of private trust. Prior to imposing sentence, a discussion was held regarding the appropriate sentencing act under which to sentence the defendant based upon the dates listed in the indictment and the fact that the defendant had not executed a waiver of his *ex post facto* rights. The trial court found that there was sufficient proof in the record to establish that the crimes occurred after the June 7, 2005 effective date of the sentencing amendments and proceeded to sentence the defendant, pursuant to the amendments, to a term of twenty-five years in the Department of Correction. The defendant timely appealed the sentencing decision.

Analysis

On appeal, the defendant has raised three issues for our review: (1) whether the trial court violated the defendant's Sixth Amendment rights by sentencing him pursuant to the 2005 amendment of our sentencing act when the proof failed to establish that the crimes occurred after June 7, 2005; (2) whether the trial court violated the defendant's Sixth Amendment rights by

applying two enhancement factors; and (3) whether the trial court erred by failing to consider numerous mitigating factors. When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Ashby*, 823 S.W.2d at 169. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401(d), Sentencing Comm’n Cmts.

I. Appropriate Sentencing Law

First, the defendant contends that the trial court violated his Sixth Amendment right by sentencing him pursuant to the 2005 sentencing amendments, absent an *ex post facto* waiver, when the proof failed to establish that the crime occurred after the June 7, 2005 effective date of the amendments. According to the defendant, “the trial court committed an error of constitutional dimension by finding, without any basis in the record, that the offense” was committed after June 7, 2005, and that this “error manifested in the denial of [the defendant] having the benefit of a presumptive sentence of twenty years in prison.”

The defendant is correct that, under prior law, the presumptive sentence for a Class A felony, absent enhancing or mitigating factors, was the midpoint within the applicable range. In this case, for a Range I offender, that presumptive minimum sentence would have been twenty years. *See* T.C.A. § 40-35-210(c) (2003). Moreover, based upon our supreme court’s holding in *Gomez II*, the trial court was precluded from enhancing the sentence based upon enhancement factors, other than prior criminal history, absent a finding of such factors by a jury. *See State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (*Gomez II*).

However, in response to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), our sentencing act was amended effective June 7, 2005. The Compiler’s Notes to Tennessee Code Annotated section 40-35-210 provide that:

[o]ffenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant’s *ex post facto* protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

The defendant’s argument is based upon his assertion that it is unclear from the proof whether his crime was committed prior to or after June 7, 2005. We note that, while the defendant could have

elected to be sentenced pursuant to the amendments by execution of a waiver, no such waiver was done in this case. Absent the waiver, a determination of when the crime occurred is essential to a determination of which act applies. If the crime was committed prior to June 7, 2005, the trial court should have applied the pre-amendment sentencing provisions. If the crime occurred after the effective date, the amended provisions were applicable.

The following colloquy occurred at the sentencing hearing:

THE COURT: . . . these enhancing and mitigating factors you've both argued, are those to be considered by the Court as only advisory, or is this a case where I weigh the enhancement against the mitigating and come up with an appropriate sentence?

[DEFENSE COUNSEL]: That would be my position.

THE COURT: The offense dates are May to September of 2005, and there's a note on the sentencing statute . . . that talks about this -- the sentencing problems pursuant to Blakely, and all of the cases after that, that indicates that if an offense is committed after June -- sometime in 2005, middle of June, whenever the statute became effective -- that unless the Defendant waives the enhancing and mitigating factors, then the Court is supposed to use those as advisory and not as mandatory. Does that make sense to you?

[DEFENSE COUNSEL]: It does.

THE COURT: So your client has not waived anything.

[DEFENSE COUNSEL]: He's not.

. . . .

[THE COURT]: What makes this difficult is the status of our sentencing law in Tennessee right now under recent case law that began with Blakely, . . . and just how a trial court is to fashion an appropriate sentence under our current mandates, both from the Tennessee Supreme Court and the United States Supreme Court, and an attempt that our Legislature has made to try to correct the matter by amending 40-35-102 to make these enhancing and mitigating factors advisory in nature. It all sort of comes together in this case.

Even more problematic in this case, pursuant to the comment under 40-35-102 regarding the new law, the act wherein these enhancing and mitigating factors are to be advisory shall apply to sentences from criminal offenses committed on or after June the 7th, 2005. Offenses committed prior to June the 7th, 2005 shall be governed by prior law, which shall apply in all respects.

However, for defendants who are sentenced after June the 7th, 2005 for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. There's been no such waiver entered in the Lucas matter, so I don't have that to fall back on.

What makes this difficult is the dates of the indictment to which this defendant now stands convicted are open-ended dates which bridge the June 7th, 2005 date. The dates are May of 2005 and September 2005; the alleged offense for which this defendant stands convicted occurred sometime during that time period, which makes the comment not particularly beneficial to this Court or helpful, because this offense could have been on one side or the other of June 7th, 2005.

All of that having been said, the Court is satisfied then that there is proof in the record that this was an on-going offense, and certainly there is some proof that the offense could have been committed after the June 7th, 2005 date, and I'm going to treat this sentence as if it were, given the current status of the law that we trial judges find ourselves now in pursuant to all these sentencing issues that have been raised since the Supreme Court issued the Blakely case.

On appeal, the State concedes that error occurred, stating that they were "unable to find . . . the 'proof' that the trial court referenced or any authority supporting the trial court's speculation about when the child rape that was the subject of the guilty plea actually occurred." However, upon *de novo* review, applying the presumption of correctness, we find that the trial court's finding is supported by evidence in the record. As noted, the defendant himself, in his interview with police detectives, stated that the crime occurred during "[t]he last part of the summer." We, as did the trial court, conclude that this is sufficient proof to find that the crime occurred after the June 7, 2005 effective date of the amendments. The record is clear that the trial court was aware of the status of the law regarding the sentencing amendment and that all principles of sentencing were considered in the case. Moreover, we note that the defendant has failed to include transcripts of the suppression and guilty plea hearings, which the court specifically stated it would rely on in imposing sentence. It is the defendant's burden to ensure that an adequate record is before this court. As such, we conclude that the trial court properly sentenced the defendant pursuant to the amended provisions of our sentencing act.

II. Enhancement Factors

The defendant next contends that the trial court, in imposing the maximum sentence within the range, unconstitutionally applied two enhancement factors. His argument, however, is based upon his assertion that he should have been sentenced under the pre-amendment sentencing law. Relying upon *Gomez II*, he asserts that the court was precluded from enhancing his sentence absent a finding of those factors by a jury. The defendant's assertions are correct, provided he was required to be sentenced under the pre-amendment law, as our supreme court, in *Gomez II*, made clear that

our prior sentencing act violated the Sixth Amendment, as interpreted by the Supreme Court in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007), by allowing a trial court to enhance a sentence based upon judicially determined facts, other than the fact of a prior conviction. *Gomez* 239 S.W.3d at 738. Thus, under prior law, the trial court's application in this case of the enhancement factor, that the defendant abused a position of private trust, violated the Sixth Amendment. We need not determine in this case whether the application of the factor for prior criminal behavior violated the Sixth Amendment, as it was based merely upon the defendant's admission of criminal misconduct rather than upon a prior conviction.

As noted above, however, the defendant in this case was properly sentenced under the 2005 amendments to the statute. Thus, the defendant's argument must fail as the 2005 amendment rendered the enhancement and mitigating factors merely advisory, not binding, on the trial courts in sentencing determinations. *State v. Stacey Joe Carter*, No. M2005-02784-SC-R11-CD (Tenn., May 19, 2008). As such, their application in this case does not violate the Sixth Amendment.

III. Mitigating Factors

Finally, the defendant contends that the trial court erred by failing to apply "numerous mitigating factors." Specifically, he contends that the court should have considered the defendant's supportive family, his honorable discharge from the military, and his exemplary work record under the catchall mitigating provision.

The defendant is correct in his argument that this court has previously held that these facts may be considered in mitigation under the catchall mitigating factor. *See* T.C.A. § 40-35-113(13) (2006); *State v. Kelley*, 34 S.W.3d 471, 482-83 (Tenn. Crim. App. 2000); *State v. McKnight*, 900 S.W.2d 36, 54-55 (Tenn. Crim. App. 1994). As argued by the State, the trial court specifically considered the mitigating factors which were "argued by counsel as well as sought out in the statute" and found that, other than the defendant's advanced age, there were "no other mitigating factors which would apply to this [d]efendant." As noted above, application of these factors is now merely advisory rather than binding. The court in this case considered all the requisite principles of sentencing prior to imposing the twenty-five-year sentence. The defendant has failed to carry his burden of showing an improper sentence.

CONCLUSION

Based upon our review of the record as a whole, we affirm the sentencing decision of the Williamson County Circuit Court.

JOHN EVERETT WILLIAMS, JUDGE